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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1546

WILLIAM BANTON MOORE, *Petitioner*

v.

COMMONWEALTH OF KENTUCKY, *Respondent*

On Petition for a Writ of Certiorari to the Court of Appeals of Kentucky

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PETITIONER'S REPLY MEMORANDUM

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The Commonwealth of Kentucky asserts two grounds in its opposition to the petition for certiorari: that the petitioner failed to present and preserve a federal question in the state court and, alternatively, that the state court rested its decision on an independent and adequate non-federal ground. Given the basis for the petition, however, these are not properly alternative grounds. The federal question presented to this

Court is whether the improper closing argument of the Commonwealth's prosecutor violated petitioner's constitutional right to a fair trial. If properly preserved and meritorious, no independent or adequate state ground could exist to justify the affirmance of the conviction. See, *e.g., Ker* v. *California,* 374 U.S. 23, 33-34 (1963). Thus, the only pertinent issues are the merits of the contention and whether it was properly preserved.

Significantly, on the merits the opposition is practically silent. Except for the conclusory statement that "the argument was not so inflammatory that this Court can say it violated petitioner's constitutional rights," [1] no attempt is made to defend the numerous improprieties which permeated the summation. Because of the expressions of personal opinion, appeals to passion and factual statements without evidentiary support, the closing argument became unconfronted testimony which is constitutionally impermissible. See Carlson, *Argument to the Jury and the Constitutional Right of Confrontation,* 9 Crim. L. Bull. 293 (1973). The federal question raised by a grossly improper closing argument is before the Court in another petition, *Donnelly* v. *DeChristoforo,* No. 72-1570. There, the Commonwealth of Massachusetts seeks review of a First Circuit decision condemning as violative of due process prosecutorial summations which convey or even permit a false impression. *DeChristoforo* v. *Donnelly,* 473 F.2d 1236, 1240 (1st Cir. 1973) citing *Miller* v. *Pate,* 386 U.S. 1 (1967) and *Hamric* v. *Bailey,* 386 F.2d 390 (4th Cir. 1967).

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[1] Brief for Respondent in Opposition at 8.

By granting these petitions, this Court can address and resolve problems which often recur and strike at the heart of the truth-determining process of our adversary jury system. The issues are clearly defined and permit explicit guidelines for future federal and state trials without opening the floodgates to requests for this Court's hindsight judgment on every summation made by a federal or state prosecutor. Rules forbidding the expression of personal opinion,[2] an argument beyond the record[3] or blatant appeals to sectional prejudice[4] are capable of clear application and enforcement. They do not require a case by case analysis and counsel can easily tailor their conduct to the Court's proscriptions.

On the issue of preservation, the trial transcript reveals that petitioner's counsel exercised every possible effort to apprise the court of his objection and seek appropriate relief. Summation does present the most difficult stage of the trial to preserve a record. By tradition, counsel forbear objection and permit one another some latitude in the interests of an uninterrupted exposition of each side of the case. For the trial to be fair, however, each counsel must adhere to self-imposed standards of proper advocacy. The existence of this practice and the possibility of its abuse highlight the need for fixed guideposts from this Court.

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[2] See, *e.g.*, Patriarca v. United States, 402 F.2d 314, 321 (1st Cir. 1968), cert. denied, 393 U.S. 1022 (1969); Harris v. United States, 131 U.S.App.D.C. 105, 402 F.2d 656 (1968).

[3] See, *e.g.*, DeChristoforo v. Donnelly, 473 F.2d 1236 (1st Cir. 1973).

[4] See, *e.g.*, New York Central R.R. Co. v. Johnson, 279 U.S. 310 (1929).

When it became clear that the attorney for the Commonwealth was not going to discipline himself, petitioner's counsel repeatedly objected and articulated the basis for his objections as fully as possible given the limitations of the trial context.[5] Based on the improprieties in the argument, petitioner moved for a mistrial. The court denied the motion giving petitioner "a continuing objection to all of the Commonwealth's argument without the necessity of particularizing the parts objected to." (623-624)

As this Court has noted in a similar context, petitioner's objections were sufficient in that they were "ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action." *Douglas* v. *Alabama*, 380 U.S. 415, 433 (1965). Thereafter, on appeal to the Court of Appeals of Kentucky the issue was extensively briefed. Accordingly, the requirement of preservation of a federal question and the reasons supporting it have been met,[6] particularly since a full record on the issue was developed and the state courts, trial and appellate, were afforded the opportunity to pass on it.

The importance of the question presented has not been denied. Basically, the only claim has been the question was not preserved. The record answers that contention and the failure of the Commonwealth of

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[5] 611, 21a; 612, 21a; 613, 22a; 617, 25a; 618, 25a; 623-24. The record references are to the trial transcript and, where applicable, the corresponding page in the Appendix to the Petition.

[6] See, *e.g.*, Cardinale v. Louisiana, 394 U.S. 437, 439 (1969).

Kentucky to meet petitioner's allegations on the merits further demonstrates the need for this Court's review.

Respectfully submitted,

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